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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2066

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, *et al.*,

Petitioners,

v.

ROGERS C.B. MORTON, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 11, 1974. Rehearing was denied on April 24, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, which is reported at 494 F.2d 987, is printed in Appendix A. Petitioners were originally granted judgment by the United States District Court for the District of Columbia. The opinion of the District Court, which is reported at 357 F.Supp. 509, is printed in Appendix B.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 11, 1974. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on April 24, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether, under the Federal Coal Mine Health and Safety Act of 1969, the Secretary of the Interior may assess civil penalties against mine operators without making and publishing factual findings?

STATUTE AND REGULATIONS INVOLVED

This case involves interpretation of Section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 819(a), the pertinent portions of which are printed in Appendix C.

The applicable procedural regulations of the Secretary of the Interior dealing with assessment of civil penalties, codified as Title 30 Code of Federal Regulations, Part 100, are reproduced in Appendix D.

STATEMENT OF THE CASE

The Federal Coal Mine Health and Safety Act of 1969 (hereinafter the Act) established interim safety and health standards for underground coal mining, and vested in the Secretary of the Interior the authority to enforce such standards. The Secretary in turn delegated to the Director of the Bureau of Mines the function of carrying out mine inspection and enforcement activities through a staff of mine inspectors who are authorized to issue violation notices, to order abatement of violations, and to order withdrawal of miners from a mine whenever, in the inspector's opinion, a condition of imminent danger exists.

The Act provides in Section 109(a)(1) that the operator of a coal mine in which a violation occurs shall be assessed a civil penalty by the Secretary of the Interior in an amount not in excess of $10,000 for each such violation, and that in determining the amount of the penalty the Secretary shall consider (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation.

The procedure to be followed in assessing civil penalties is explicity spelled out in Section 109(a)(3) of the Act. It provides that a civil penalty shall be assessed by the Secretary "only after the person charged with a violation under this Act has been given an opportunity for a public hearing and *the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted,* and incorporating, when appropriate, an order therein requiring that the penalty be paid." (Emphasis added).

Initially, at the time the Act became effective, the Secretary delegated his penalty assessment functions to the Interior Department Board of Mine Operations Appeals, and adopted procedural rules which required that penalty assessment determinations be accompanied by decisions "incorporating findings and conclusions and the reasons or basis therefor, on the material issues of fact, law or discretion presented on the record."[1] If these procedural rules had been adhered to the present action would not have been brought.

However, some nine months later, the Secretary issued entirely new regulatory procedures for assessment of civil penalties, designated as 30 CFR Part 100.[2] This procedure which is the subject of plaintiffs' complaint in this lawsuit, delegated to "an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines," the authority to determine the liability of the mine operator for a civil penalty and the amount of penalty to be proposed. (30 CFR Section 100.4(a); Appendix D, p. 2).

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[1] Title 30 CFR Parts 300 and 301, published March 25, 1970, Federal Register, Vol. 35, pp. 5255-5258.

[2] Federal Register, Vol. 36, No. 11, January 16, 1971.

Briefly stated, the Part 100 regulations established a summary type of penalty assessment procedure under which the mine operator charged with a violation of a safety or health standard was served with a proposed penalty assessment order prior to any proceeding to determine whether a violation in fact occurred, and was simultaneously notified that if he failed to protest such penalty assessment within 15 days he would be deemed to have waived his right to protest and to a formal adjudication, and the proposed penalty assessment would become the final assessment order of the Secretary of the Interior. (30 CFR Section 100.4(e)).

The record in the District Court showed that under the Part 100 procedure proposed assessment orders were issued solely on the basis of unproved notices of violation issued by mine inspectors, and without any preliminary determination that the cited violations had in fact occurred. The printed form used in issuing proposed penalty assessment orders contained a "boiler plate" statement that consideration had been given to the six statutory criteria specified in Section 109(a)(1) of the Act for determining the amount of the assessed penalty, but the evidence showed, and the District Court found, that this was indeed not the case, and that the contrary was true. The Court noted that assessment orders "seem to issue forth on a mass production basis from a clerical machinery completely divorced from any genuine process of considered determination as to each case." Appendix B. p. 11b.

In granting summary judgment for the plaintiffs and enjoining the Secretary from utilizing or enforcing the challenged procedures, the District Court held that under Section 109(a), "It is the Secretary's responsibility to see that the statutory requirements are fulfilled

in all cases, even where the operator does nothing." The Court went on to hold that:

> "In all cases before an assessment order can become final, the Secretary must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations thereon with regard to the amount of the penalty which is warranted, and (3) make express determinations that a violation did occur. Express determinations are to be made 'by decision incorporating his findings of fact therein.'" (Appendix B, p. 12b).

Upon appeal by the Secretary, the Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court, and construed the Act as not requiring the Secretary to issue a decision incorporating findings of fact unless the mine operator requests a hearing. In reaching this conclusion the Court relied upon its interpretation of the statutory intent which it drew from the legislative history of the Act. Appendix A, pp. 9a-14a.

At the same time that the Petitioners herein were challenging the Part 100 assessment regulations in the District of Columbia, the Secretary filed suits in the District Court for the Western District of Pennsylvania against three coal mine operators[3] to enforce penalty assessment orders issued under the Part 100 procedures. In those cases the District Court found the assessment orders issued under the Part 100 regulations were invalid and unenforceable and dismissed the Secretary's actions. On appeal by the Secretary to the Court of Appeals for the Third Circuit that Court affirmed the dismissal of these suits, stating:[4]

[3] *Morton v. Delta Mining Co.; Morton v. G.M.W. Coal Co.; Morton v. Edward Mears, et al.* See footnote 4, infra.

[4] *Morton v. Delta Mining Co.*, 495 F.2d 38 (3d Cir., 1974). Printed as Appendix E.

> "The language of the Act would appear to require that, whether or not the operator requests a hearing the assessment *must* be made 'by [the Secretary's] decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted'. The Secretary seeks refuge from this interpretation by pointing to the legislative history, which, he asserts, supports his reading of Section 109.
>
> "Nothing in that history convinces us, however, that any departure from the plain import of the statutory terms is warranted. There is not a modicum of evidence in the reports from either House of Congress, nor in the Conference Committee report on the compromise bill that became section 109, that would indicate an intent to dispense with findings of fact where no hearing is requested. Appendix E, pp. 6e, 7e. (Emphasis in original).

In *Delta Mining* the Third Circuit also noted that its holding was at odds with the decision of the District of Columbia Circuit in the present case, and commented that "The District of Columbia's decision in *National Independent* appears to buck the drift of much of that Court's prior jurisprudence." Appendix E, p. 11e, fn. 30.

REASONS FOR GRANTING THE WRIT

I.

THERE EXISTS A CONFLICT IN DECISIONS OF TWO CIRCUITS ON AN IMPORTANT QUESTION OF LAW

The decision of the District of Columbia Circuit is in direct conflict with the decision of the Third Circuit in

Morton v. Delta Mining Co., supra, on the critical question of whether the Secretary may issue valid and enforceable civil penalty assessment orders without having made the requisite findings of fact respecting the occurrence of a violation and without having made a determination, based on the six statutory criteria, as to the amount of the penalty which is warranted. In view of this direct conflict neither the Petitioners nor the Secretary have a rule of law on which they can rely, and this conflict can only be resolved by this Court. See *Federal Power Commission v. Texaco Inc.*, 377 U.S. 33, 37; 84, S.Ct. 1105, 1108; 12 L.Ed. 2d 112, 115 (1964).

II.

THE COURT BELOW IGNORED PROPER RULE OF STATUTORY CONSTRUCTION

In reaching its decision in this case the Court of Appeals for the District of Columbia Circuit went behind the unequivocal language of Section 109(a) of the Act and proceeded to garner from the legislative history a construction of the statutory language directly opposite to its plain meaning. (See Appendix A, p. 11a).

In *Sea-Land Service, Inc. v. Federal Maritime Commission* 404 F.2d 824 (1968), the Court of Appeals for the District of Columbia Circuit correctly noted the established rule of statutory construction that:

> "Ordinarily, where the language of a statute is clear and unambiguous on its face, the thrust of that language should not be controverted by seeking to show an inconsistent legislative intent. (Citing *United States v. Oregon*, 336 US 643, 81 S. Ct. 1278, 6 L.Ed. 2d 575 (1961)).

In respect to Section 109(a) of the Act there is no ambiguity or lack of clarity which would require resort to the legislative history to determine its meaning, and the plain words used thus constitute the most persuasive evidence of the intent of the legislature. *District of Columbia National Bank v. District of Columbia,* 348 F.2d 808, 810, (3d Cir. 1965) (citing *Chung Fook v. White,* 264 U.S. 443, 44 S.Ct. 361, 68 L.Ed. 781 (1924)).

III.

THE DECISION OF THE COURT BELOW CONFLICTS WITH CONTROLLING PRINCIPLES ENUNCIATED IN DECISIONS OF THIS COURT

The decision of the District of Columbia Circuit is in conflict with principles of administrative law recognized by this Court.

In *Burlington Truck Lines v. United States,* 371 U.S. 156, 83 S.Ct. 239, 9 L.Ed. 2d 207 (1962) this Court held that the powers of an administrative agency must be exercised in accordance with and in the mode prescribed by the statute creating such power, and an agency cannot rightly dispense with any of the essential forms of proceedings which the legislative has prescribed in investing it with the power to act.

In *CAB v. Delta Airlines,* 367 U.S. 316, 81 S.Ct. 1611, 6 L.Ed. 2d 869 (1961) the Court held that an attempt by an agency to exercise a power without compliance with the procedural provisions laid down in the statute as to the manner and circumstances of its exercise is a nullity.

Similar rulings were made in *Leedom v. Kyne*, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed. 2d 210 (1958); *United States v. Chicago, Milwaukee and St. Paul R.R.*, 294 U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023 (1935), and numerous other cases.

IV.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH PRINCIPLES WHICH IT HAS ITSELF FOLLOWED IN PRIOR CASES

The decision of the Court of Appeals for the District of Columbia Circuit in this case is inconsistent with and contrary to the general body of law which that Court has itself established and followed in prior cases. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 596 (D.C. Cir. 1971); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) cert. denied 403 U.S. 923 (1971); *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1972); *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971); Station *KFH v. FCC*, 247 F.2d 570 (D.C. Cir. 1957)).

In *Environmental Defense Fund, supra*, the Court held that the Secretary of Agriculture must articulate the criteria he follows in making administrative decisions respecting registration of pesticides. 439 F.2d at 596.

The *Greater Boston* case, *supra*, contains this observation:

> "The function of the Court is to assure that the [administrative] agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination." 444 F.2d at 851.

The Court indicated in *D.C. Federation, supra*, that the absence of either findings or an administrative record "simultaneously obfuscates the process of review and signals sharply the need for careful scrutiny." 459 F.2d at 1237-38.

In *Calvert Cliffs, supra*, the Court observed that in requiring responsible agency officials to prepare "detailed statements" covering the environmental impact of certain actions, The National Environmental Protection Act of 1969 "provides evidence that the mandated decision making process has in fact taken place and, most importantly, allows those removed from the initial process to evaluate and balance the factors on their own." 449 F.2d at 1114.

Station *KFH, supra*, was similar to the foregoing cases. There the Court refused to accept an agency's summary recitation to the effect that it had considered all of the pertinent matter and had taken appropriate action. 274 F.2d at 572.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1678

NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL.

v.

ROGERS C. B. MORTON (SECRETARY OF THE INTERIOR OF THE UNITED STATES) ET AL., APPELLANTS

Appeal from the United States District Court for the District of Columbia

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Decided February 11, 1974

Michael Kimmel, Attorney, Department of Justice, with whom *Irving Jaffe*, Acting Assistant Attorney General, *Harold H. Titus, Jr.*, United States Attorney, *Kathryn H. Baldwin*, Attorney, Department of Justice, and *J. Philip Smith*, Assistant Solicitor, Department of the Interior, were on the brief for appellants. *Arnold T. Aikens* and *Robert M. Werdig, Jr.*, Assistant United States Attorneys, also entered an appearance for appellants.

John L. Kilcullen for appellees.

Before BAZELON, *Chief Judge*, and MCGOWAN and MACKINNON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge:* Under the Federal Coal Mine Health and Safety Act of 1969 [1] the Secretary of the Interior is charged with enforcing mandatory health and safety standards in the nation's coal mines. Pursuant to this authority the Secretary may assess civil penalties against operators of coal mines in which health and safety violations occur.[2] The present action challenges the procedures adopted by the Secretary to assess these penalties.

Plaintiffs, an association of coal mine operators and various individual coal mine operators, seek an injunction and declaratory relief on the ground that the civil penalty assessment procedures embodied in 30 C.F.R. Pt. 100 violate the procedural requirements of Section 109 (a) (3) of the Act, 30 U.S.C. § 819(a) (3) (1970). The district court granted summary judgment for the plaintiffs and permanently enjoined the Secretary from utilizing or enforcing the challenged procedures.[3] Because we find the Secretary's procedures to be legal under the Act as we interpret it, we reverse.

I

When a coal mine inspector discovers a health or safety violation he delivers a notice of violation to the mine operator.[4] This notice contains "a detailed description

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[1] 30 U.S.C. §§ 801 *et seq.* (1970) (Pub. L. 91-173, Dec. 30, 1969, 83 Stat. 742) [hereinafter referred to as the Act].

[2] 30 U.S.C. § 819 (1970).

[3] National Independent Coal Operators Ass'n. v. Morton, 357 F. Supp. 509 (D.D.C. 1973).

[4] 30 U.S.C. § 814 (1970). The notice of violation requires the mine operator to correct the violation within a specified

period. *Id.* § 814(b). In addition to issuing a notice of violation, if the inspector finds that an imminent danger exists, he may direct that all personnel be withdrawn from the area until the danger is abated. *Id.* § 814(a).

of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard . . . ." [5] For example, a notice of violation submitted to this court by the parties describes the violation as follows:

> [At 12:40 P.M. on December 21, 1971, an] accumulation of float coal dust was present in the No. 3 return entry 3 south off 1 Main West for a distance of about 1,500 feet.[6]

Over 227,000 notices of violation were issued from the effective date of the Act, March 30, 1970, through June 30, 1973.[7]

The Act requires that for each violation of a mandatory health or safety standard the mine operator "shall be assessed a civil penalty by the Secretary . . . ." [8] In view of the immense number of violations, the Secretary promulgated rules and regulations establishing preliminary procedures to be followed in assessing civil penalties.[9] It is these preliminary procedures which are challenged in the present action.

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[5] *Id.* § 814(e).

[6] Jt. App. at 85.

[7] Brief for Appellant at 18 & n.22. There were in excess of 100,000 notices of violations per year.

[8] 30 U.S.C. § 819(a) (1) (1970). The net amount assessed under the Part 100 procedures from January 16, 1971 to March 9, 1973 exceeded $24,500,000. Brief for Appellant at 18 n.23.

[9] 30 C.F.R. Pt. 100 (1973). These procedures were adopted in January 1971, 36 FED. REG. 779-80, and were amended in certain respects in June 1972, 37 FED. REG. 11459-60, 11861-62. Since the entry of the district court's order enjoining the

The regulations provide that after a notice of violation is issued it is reviewed by an Assessment Officer who determines "the liability of the operator . . . for a civil penalty and the amount of penalty to be proposed." [10] The Act prescribes six factors which the Secretary must consider in determining the amount of the penalty,[11] and the Secretary's regulations specifically require the assessment officer to consider all relevant circumstances, including the six factors specified in the Act.[12]

After reviewing the notice of violation and determining an appropriate amount for a civil penalty, the as-

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preliminary procedures, such procedures have been suspended, 38 FED. REG. 10085 (April 24, 1973), and all penalty assessment cases are being processed under the formal hearing procedures of 43 C.F.R. §§ 4.540 *et seq.*, as revised, 38 FED. REG. 10086-87 (April 24, 1973).

[10] 30 C.F.R. § 100.3(a) (1973).

[11] In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 819(a)(1) (1970).

[12] 30 C.F.R. § 100.3(c) (1973). *See also id.* § 100.2(a).

Subsequent to the district court's injunction, the Secretary amended the assessment procedures to utilize an "assessment formula." 38 FED. REG. 10086 (April 24, 1973). This formula calculates the appropriate penalty in a particular case by assigning numerical values to each of the six statutory factors. *See* Brief for Appellant at 13-17. Although the Secretary has represented to this court that the assessment formula will be retained even if the district court's judgment is reversed, we need not consider the assessment formula in deciding the present case. *Id.* at 12, 13.

sessment officer serves a Proposed Order of Assessment upon the mine operator. This proposed assessment order refers to the particular violation, specifies the amount of the proposed penalty,[13] and advises the mine operator that he has 20 days from receipt of the order either to protest the proposed penalty or to petition for hearing and formal adjudication.[14] If the operator fails timely to protest or request a formal hearing, "he shall be deemed to have waived his right of protest and his right of formal adjudication with opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior." [15]

In the event that the operator protests the proposed order, the assessment officer may reconsider in light of the operator's arguments and redetermine, amend or reissue the proposed order.[16] Upon amendment or reissuance of the proposed order, the operator again has 20 days to accept or reject it in whole or in part, and to request a hearing and formal adjudication.[17] If the operator does not file a timely request for a hearing and formal adjudication, the amended or reissued proposed assessment order becomes the final assessment order of the Secretary.[18]

In the event that the operator does request a hearing,[19]

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[13] 30 C.F.R. § 100.3(b)(2) (1973).

[14] *Id.* § 100.3(d). The operator may protest the order either partly or in its entirety.

[15] *Id.* § 100.3(e). The assessment officer may extend the time allowed for protest. *Id.* § 100.3(g)(1).

[16] *Id.* § 100.3(g)(2), (3).

[17] *Id.* § 100.3(h).

[18] *Id.*

[19] The petition for hearing and formal adjudication must be in writing and must include a list of the violations in issue.

the hearing is de novo [20] and the Secretary has the burden of proving by a preponderance of the evidence that the violation occurred and that the penalty is warranted.[21] The hearing examiner must render a decision based solely on the record of the hearing,[22] incorporating findings of facts and conclusions of law.[23] Thus, throughout the preliminary procedures for assessing civil penalties, formal adjudication is available to a mine operator who either contests the occurrence of the violation or protests the amount of the proposed penalty.

II

Plaintiffs contend that these preliminary procedures violate the procedural requirements of Section 109(a)(3) of the Act which provides as follows:

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43 C.F.R. § 4.541(a) (1972). Alternatively, the operator may attach to his petition a copy of the final proposed assessment order which clearly indicates the violations at issue. *Id.* § 4.541(b). Within 30 days of filing his petition, the operator must file a short and plain statement of the factual and legal issues, as well as a brief statement concerning the applicability of the six statutory criteria of 30 U.S.C. § 819(a)(1). *Id.* § 4.544(a).

[20] 30 C.F.R. § 100.5(b) (1973).

[21] 43 C.F.R. § 4.587 (1972).

[22] *Id.* § 4.24.

[23] *Id.* § 4.593. The hearing examiner's decision is reviewable by the Board of Mine Operations Appeals. 43 C.F.R. §§ 4.1(4), 4.500(a)(2), 4.600 (1972).

If the formal adjudication is adverse to the operator he may obtain de novo judicial review of the penalty by not paying it and awaiting the Secretary's enforcement action in the district court. 30 U.S.C. § 819(a)(4) (1970). The same judicial review is available where the operator fails to request a hearing and allows the proposed assessment order to become final.

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 815 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

30 U.S.C. § 819(a)(3) (1970). Plaintiffs argue that this section requires a formal decision incorporating findings of fact in every case regardless of whether a mine operator waives his right to a formal hearing by failing to file an objection to the proposed assessment order. If plaintiffs' interpretation of the Act is correct, then the Secretary's preliminary procedures for assessing civil penalties are illegal because, absent a request for formal adjudication, the final assessment order issues without a decision which complies with the formal requirements of the Administrative Procedure Act.[24]

Section 109(a)(3) is logically capable of two different constructions. Plaintiffs would read the statute, even where no hearing is requested by the operator, as follows: "A civil penalty shall be assessed by the Secretary only after . . . the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted . . . ."

The Secretary maintains that the requirement for a decision must be read in context and that the section as a whole describes the formal adjudicative process which

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[24] 5 U.S.C. §§ 554, 557 (1970); *see* notes 25-28 *infra* and accompanying text.

is available to a mine operator upon his request. The Act clearly requires a formal decision whenever disputed issues are contested in a hearing. However, according to the Secretary's interpretation, the requirement for a formal decision of the character and extent for which appellant argues, is linked to the statutory guarantee of an opportunity for a hearing. Under this interpretation a formal decision is not required unless the mine operator takes advantage of that opportunity by requesting a hearing.

In deciding which is the proper interpretation it is helpful to identify the nature of the decision contemplated by the Act. The Act requires more than an "act of deciding." [25] The decision described in Section 109(a)(3) parallels the decision requried by the Administrative Procedure Act (hereinafter APA) after a formal hearing has been conducted. The APA specifies that a decision following a hearing must include "(A) findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof." [26] A decision under Section 109(a)(3) must include (1) findings on the material issues of the occurrence of a violation and the amount of the penalty, and (2) an order requiring that the penalty be paid.[27] This similarity to a formal APA decision suggests that when a decision is required under Section 109(a)(3), it must contain "specific and detailed findings and conclusions of the kind customarily associated with formal proceedings." [28]

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[25] WEBSTER'S NEW INTERNATIONAL DICTIONARY 860 (2d ed. unabr. 1961).

[26] 5 U.S.C. § 557(c) (1970).

[27] 30 U.S.C. § 819(a)(3) (1970).

[28] Automotive Parts & Accessories Ass'n. v. Boyd, 132 U.S. App.D.C. 200, 207, 407 F.2d 330, 337 (1968).

Plaintiffs would interpret the Act to require this kind of formal decision even though the mine operator wilfully chooses not to request a hearing on the proposed penalty. However, once given notice of his right to object, the operator's failure to request a hearing suggests that he does not dispute the fact of violation nor disagree with the appropriateness of the specific penalty proposed. As the district court pointed out, in the absence of a request for a hearing the Secretary may act on the information available to him and need not adduce evidence for the other side.[29] Where no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order.

In situations where a statute prescribes a hearing prior to agency action the courts have held that the agency need not conduct a hearing if no disputed issue exists.[30] "In such situations, the rationale is that Con-

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[29] 357 F.Supp. at 513.

[30] FPC v. Texaco, 377 U.S. 33, 39-44 (1964); Denver Union Stock Yard Co. v. Producers Livestock Marketing Ass'n., 356 U.S. 282, 287 (1958); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971); Dyestuffs & Chemicals, Inc. v. Flemming, 271 F.2d 281, 286-87 (8th Cir. 1959), *cert. denied*, 362 U.S. 911 (1960); *see* Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 620-22 (1973).

In *United States v. Storer Broadcasting Co., supra,* the FCC had denied a license application without a hearing because the application established on its face a violation of a substantive FCC rule. Even though the governing statute required a "full hearing" before denial of an application, the Supreme Court concluded that where an application clearly contravened substantive rules, a hearing was unnecessary unless the application

> set forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications

gress does not intend administrative agencies to perform meaningless tasks." [31] Similarly, as we interpret Section 109(a)(3), the Secretary need not prepare a formal decision where there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing.

If the operator wants to contest the alleged violation or if he believes that his particular circumstances warrant a lesser penalty, he need only request a hearing and briefly describe the issues in dispute. Such a request puts the Secretary to his burden in a hearing of proving both the violation and the appropriateness of the penalty. Following the hearing the Secretary has the statutory responsibility for preparing a "decision incorporating his findings of fact therein." [32]

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that do not state a valid basis for a hearing. If any applicant is aggrieved by a refusal, the way for review is open.

Id. at 205. Therefore, the statutorily prescribed "full hearing" was only required where the applicant demonstrated the existence of a disputed issue.

A similar situation exists in the the present case. A notice of violation issued to a mine operator evidences a violation of the substantive health and safety standards established by Congress, and the proposed penalty assessment order is based upon the notice of violation. The operator is advised that he has the right to request formal adjudication and he is fully advised of the consequences of a failure to request such adjudication. If any mine operator objects to the notice of violation or to the proposed penalty and desires a formal decision, he need only request formal adjudication. As in the *Storer Broadcasting* decision, "the way for review is open." *Id.*

[31] United States v. Consolidated Mines & Smelting Co., 455 F.2d 432, 453 (9th Cir. 1971).

[32] We thus interpret the Act to permit any mine operator who desires a formal decision on the alleged violation or the amount of the proposed penalty to obtain such decision merely by indicating his objection and making a simple request for a hearing. By failing to request a hearing he waives his

III

The legislative history of Section 109(a)(3) supports the foregoing interpretation of the statute with respect to the decision requirement. Both the Senate and House bills, in the form in which each bill passed its respective house, required a formal decision only after a hearing had been conducted. The House bill provided:

> Upon written request made by an operator within thirty days after receipt of an order assessing a penalty under this section, the Secretary shall afford such operator an opportunity for a hearing and, *in accordance with the request*, determine by decision whether or not a violation did occur or whether the amount of the penalty is warranted or should be compromised.[33]

The Senate bill read as follows:

> An order assessing a civil penalty under this subsection shall be issued by the Secretary only after the person against whom the order is issued has been given an opportunity for a hearing and the Secretary has determined by decision incorporating findings of fact *based on the record of such hearing* whether or not a violation did occur and the amount of the penalty, if any, which is warranted. Section 554 of title 5 of the United States Code shall apply to any such hearing and decision.[34]

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right to formal adjudication. This procedure is analogous to the procedure in civil litigation where a defendant who fails to answer a complaint may have a default judgment entered against him. FED. R. CIV. P. 55.

[33] H.R. 13950, 91st Cong., 1st Sess. § 109(b) (1969) (115 CONG. REC. 32064) (emphasis added). Most of the Act's legislative history is reprinted in a one-volume committee print. HOUSE COMM. ON EDUCATION AND LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY, FEDERAL COAL MINE HEALTH AND SAFETY ACT (1970) [hereinafter cited as Legislative History]. H.R. 13950 § 109(b) appears in Legislative History at 932.

[34] S. 2917, 91st Cong., 1st Sess. § 808(a)(3) (1969) (115

The italicized language demonstrates that under both the Senate and the House bills the requirement for a formal decision was clearly tied to the operator's request for a hearing.

Following passage in both houses, the respective bills were referred to a Conference Committee on the disagreeing votes between the two houses. Although the Conference Committee "adopt[ed] the Senate provision," [35] the Committee deleted the language italicized above. Thus the italicized language did not appear in Section 109(a)(3) of the Conference bill which eventually was enacted. The only explanation for this section appears as follows in the Conference Report:

> Both the Senate bill and the House amendment provided an *opportunity* for a hearing in assessing such penalties, but the Senate bill required a record hearing under 5 U.S.C. 554. The conference substitute adopts the Senate provision with the added provision that, where appropriate, such as in the case of an appeal from a withdrawal order, an effort should be made to consolidate the hearings. The commencement of such proceedings, however, shall not stay any notice or order involving a violation of a standard.[36]

We do not believe that the Conference Committee's deletion of the italicized language from the Senate bill reflected an intent to alter the procedural requirements of the bill. The Committee's concern was that the Act afford an *opportunity* for formal adjudication under 5 U.S.C. § 554 and the Conference Report emphasized that "[b]oth the Senate bill and the House amendment provided an *opportunity* for a hearing . . . ." [37] If, as plain-

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CONG. REC. 28256, Legislative History at 546) (emphasis added).

[35] H.R. REP. No. 91-761, 91st Cong., 1st Sess. 71 (1969) (Legislative History at 1033).

[36] *Id.* (emphasis added).

[37] *Id.* (emphasis added).

tiffs suggest, the Committee intended to alter the bill's procedural requirements to require a formal decision where the operator did not avail himself of the opportunity for formal adjudication, one would expect the Committee to mention the change in the Conference Report. Their failure to do so, together with their statement that they adopted the Senate provision, indicates that the Committee deleted the italicized language because they considered it surplusage.

The district court expressed concern that the preliminary procedures adopted by the Secretary "would shift the initial burden to the mine operator charged with the violation," and that "Congress chose not to adopt such an approach when it was expressly proposed in the 'administration bills' of the proposed legislation." [38] We do not share the district court's concern. Requiring the operator to request a hearing and briefly describe the issues in dispute does not impose a significant burden upon the operator. At the hearing the burden remains with the Secretary to prove his case by a preponderance of the evidence.[39]

Furthermore, the legislative history does not reflect congressional disapproval of the procedures adopted by the Secretary. Although the administration bills did specify a procedure similar to that challenged here, the broad procedural requirements ultimately adopted are not inconsistent with the more detailed provisions of the administration bills.

The administration bills, as well as the bill approved by the House, specified that a mine operator must request a hearing in writing within 30 days after receipt of an assessment order.[40] The corresponding section of the Sen-

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[38] 357 F. Supp. at 512.

[39] 43 C.F.R. § 4.587 (1972).

[40] The pertinent provision of the bill as approved by the House is set forth above. Note 33 *supra* and accompanying

ate bill afforded the mine operator an opportunity for formal adjudication but did not detail the specific procedures for requesting a hearing.[41] The statement in the Conference Report, set forth above,[42] indicates that the Conference Committee considered the only significant difference between these sections of the bills to be the reference in the Senate bill to the Administrative Procedure Act, and that this slight difference was the reason it adopted the language of the Senate bill. In view of the explanation provided by the Report of the Conference Committee, we cannot conclude that Congress intended to disapprove the more specific procedure outlined in the administration bills.

IV

We conclude that the Act does not require the Secretary to prepare a formal decision unless the mine operator exercises his right to request formal adjudication. Upon receipt of a proposed assessment order, if a mine operator wants to contest either the fact of violation or the amount of the proposed penalty, he need only request a hearing and briefly describe the issues in dispute. Following such a request the Secretary must provide formal adjudication in compliance with 5 U.S.C. § 554, including a formal decision. The Act does not require a formal decision where no hearing is requested and no issues are in dispute.

Reversed.

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text. The corresponding provisions of the administration bills were virtually identical to the provision in the bill approved by the House. *See* S. 1300, 91st Cong., 1st Sess. § 113(b) (1969); H.R. 7976, 91st Cong., 1st Sess., § 113(b) (1969).

[41] Note 34 *supra* and accompanying text.

[42] Note 36 *supra* and accompanying text.

APPENDIX B

NATIONAL INDEPENDENT COAL OPERATORS ASSOCIATION et al.

v.

Rogers C. B. MORTON, Secretary of the Interior et al.

Civ. A. No. 397-72.

United States District Court,
District of Columbia.

March 9, 1973.

Action was brought by coal operators' association challenging procedures adopted by Bureau of Mines in assessing civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act. On defendant's motion to dismiss or, in the alternative, for summary judgment and on plaintiff's cross motion for summary judgment, the District Court, Aubrey E. Robinson, Jr., J., held that assessment of civil penalties by mailing to affected operator a proposed order of assessment listing only the violation and amount of penalty assessed, with operator's failure to object resulting in automatic and unconsidered final order against him, is a procedure not authorized by Act. In addition, the Court held that Secretary was required to make findings of fact as to occurrence of a violation and amount of a penalty which was warranted regardless of whether the operator had exercised his opportunity for a hearing.

Defendant's motion denied; plaintiff's motion granted.

1. Labor Relations ⇦13

In assessing civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act, the Secretary of the Interior must make findings of fact as to the occurrence of a violation and the amount of the penalty which is incurred, regardless of whether the operator has exercised his opportunity for a hearing. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

2. Labor Relations ⇦13

Before assessment of a civil penalty for violation of health and safety standards under Federal Coal Mine Health and Safety Act can become final the Secretary of the Interior must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations thereon with regard to amount of the penalty which is warranted, and (3) make express determinations that violation did occur; such express determinations are to be made by a decision incorporating his findings of fact therein. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

3. Labor Relations ⇦13

Secretary of Interior may employ informal, preliminary procedures in assessing civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act; however, if those procedures do not resolve the matter, official action toward entry of a final assessment order by the Secretary can be taken only in compliance with the statutory requirements. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

4. Labor Relations ⇦13

In determining whether to assess civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act, the Bureau of Mines is entitled to act on the information before it, provided the affected operator has been apprised of that information and given the opportunity to dispute or supplement it; at such point findings can properly be made on a considered evaluation of available information; an operator cannot fully turn a deaf ear to the proceedings and expect that the Bureau will be required by the court to develop a record on both sides as fully as if the operator had participated by counsel throughout. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

5. Labor Relations ⇐13

Assessment of civil penalties for violation of health and safety standards under Federal Coal Mine Health and Safety Act by mailing to affected operator a proposed order of assessment listing only the violation and amount of penalty assessed, with operator's failure to object resulting in automatic and unconsidered final order against him, is a procedure not authorized by Act. Federal Coal Mine Health and Safety Act of 1969, §§ 2 et seq., 109(a)(1, 3), 30 U.S.C.A. §§ 801 et seq., 819(a)(1, 3).

John L. Kilcullen, Gall, Lane, Powell & Kilcullen, Washington, D. C., for plaintiffs.

Harold H. Titus, Jr., U. S. Atty., Arnold T. Aikens, Robert M. Werdig, Jr., Asst. U. S. Attys., Washington, D. C., for defendants.

MEMORANDUM AND ORDER

AUBREY E. ROBINSON, Jr., District Judge.

This action involves a challenge to the procedures adopted by the Bureau of Mines, United States Department of the Interior, in assessing civil penalties for violation of health and safety standards under the Federal Coal Mine Health and Safety Act of 1969, Public Law 91-173, 30 U.S.C. § 801 et seq. Specifically, Plaintiffs claim that the Secretary and his subordinates have violated, and continue to violate, the requirements of Section 109(a)(1) and (3) of the Act, 30 U.S.C. § 819(a)(1) and (3). Subsection 109(a)(1) requires that in determining the amount of civil penalties to be assessed under the act the Secretary "shall consider" six factors: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the operator's business; 3) whether the operator was negligent; 4) the effect of the penalty on the operator's ability to continue in business; 5) the gravity of the violation, and 6) the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation. Subsection 109(a)(3) requires that a civil penalty shall be assessed by the Secretary

> only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. . .

This is a question of first impression as to the construction and application of these provisions. The matter is now before the Court on Defendant's Motion to Dismiss or, in the alternative, for summary judgment, and on Plaintiff's cross-motion for Summary Judgment.

At present, when a Federal Mine Inspector finds a violation of the health or safety standards of the act, a "notice of violation" is issued to the Bureau of Mines in Washington. Based solely upon that notice of violation an assessment officer prepares and issues a "Proposed Order of Assessment" which lists the penalty to be assessed and recites verbatim that the six statutory factors have been considered. Upon receipt of the Proposed Order of Assessment, which lists only the violation and the amount of the penalty assessed, the operator may file a protest against either the finding of a violation or the appropriateness of the penalty, or both. Upon protest the Assessment Officer may reconsider his initial proposed assessment in light of information and data submitted by the operator and may vacate, amend, or affirm the initial Proposed Order. Vacating the order, of course, ends the matter. If the order is either amended or affirmed the operator may then demand a public hearing, to be conducted under the Administrative Procedure Act, 5 U.S.C. § 554. If the operator does nothing in response to the Proposed Order of Assessment, after fifteen (15) working days, "he shall be deemed to have waived his right of protest, including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order

of the Secretary of the Interior." 30 C.F.R. § 100.4(e). Part 100 of Title 30 of the Code of Federal Regulations contain the only written guidelines governing the penalty assessment process. 30 C.F.R. § 100.4(c) requires that in determining the amount of penalty to be initially proposed the assessment officer will consider all relevant circumstances including the six factors required by statute to be considered. Appendix A to Part 100 contains a penalty schedule listing suggested penalty ranges for various types of violations, albeit with a proviso that particular circumstances of a case might warrant variation from the listed schedule. There are no written guidelines within the assessment officer to guide the assessment officers in evaluation or application of the six statutory criteria for penalty assessment. When no protest is offered to a Proposed Order a form entitled "finding of fact" is inserted in the appropriate case file in the assessment office. That form recites that the assessment officer has found as fact that the cited violation did occur. From the effective date of the Act, March 30, 1970, through June 30, 1972, over 96,000 orders of assessment were issued by the Assessment Office of the Bureau of Mines.

Dêfendants here contend that the process by which the initial Proposed Order of Assessment is issued is "basically informal and preliminary in nature and provide(s) the coal mine operator with the opportunity to resolve the question of a civil penalty without more formal and time-consuming adjudicatory hearing procedures." (Defendants Br. at 4). The Court has difficulty with this characterization, however, for if the mine operator does nothing the Proposed Order ripens into a final order, enforceable in accord with the provisions of the statute. Under the statute, all final orders must have been prepared and issued in accord with the requirements of subsections 109(a)(1) and (3), i. e. the six statutory factors must have been considered in determination of the penalty to be assessed, the operator charged with the violation must have been given an opportunity for a public hearing, and the Secretary must have determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. Bureau regulations, 30 C.F. R. § 100.4(c), recognize that the six statutorily prescribed factors must be considered even in "determining the amount of the *proposed* penalty." The Bureau contends that these factors are in fact considered in the initial assessment process, despite the absence of any written guidelines within the Bureau

for evaluation and application of the factors and despite the absence of any record of their evaluation and application to a given case in the individual case file. In short, without any guidelines or restrictions, and without making any record, the assessment officer "considers" the factors subjectively, in a virtual vacuum. Approximately 100,000 such assessments were thus "considered" over two years. These are strong indications that the proposed order of assessment is anything but a considered determination. Since a factual issue might be raised on this point, however, it is unnecessary to pursue the point further in determining the present motions.[1]

[1] It is undisputed that the operator charged with a violation is given an opportunity for a hearing. Defendants would have the court read the statutory language as also requiring only an "opportunity" for a determination by

1. As to the substantial inadequacies in the penalty assessment program, even from a purely administrative viewpoint, see Report to the Conservation and Natural Resources Subcommittee on Government Operations, House of Representatives; Improvements Needed in the Assessment and Collection of Penalties—Federal Coal Mine Health and Safety Act of 1969 (B-170686), General Accounting Office, July 5, 1972.

the Secretary, by decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted. In the Court's view, however, the statute absolutely requires such a determination by the Secretary in all cases, not merely the "opportunity" for a determination. By the most basic rules of statutory construction the word "opportunity" in Section 109(a)(3) relates only to the public hearing while the remainder of the Section requires that an assessment shall be made "only after . . . the Secretary has determined, by decision . . ." In short, in each case, whether the operator has exercised his opportunity for hearing or not, the Secretary must make findings of fact as to the occurrence of a violation and the amount of the penalty which is warranted. The only purpose for such a statutory provision is to ensure a considered determination by the Secretary in every case both as to the occurrence of a violation and as to the appropriate penalty. To allow the simple forms now employed for this purpose to suffice would be to make a mockery of the express statutory language requiring a "decision, incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted. . ." The present forms contain no findings as to the penalty other than the amount to be imposed.

The system thus required by Congress may be an administrative burden on the Bureau of Mines because of the volume of cases, the necessity for individual consideration of each case, and staff limitations. Nevertheless it is not for this Court to rewrite the statute to suit the convenience of its administrators. For whatever reasons, Congress wrote into this statute the procedural requirements here in issue. It is clear to this Court that they have not been complied with. As Plaintiffs contend, assessment orders seem to issue forth on a mass production basis from a clerical machinery completely divorced from any genuine process of considered determination as to each case.

[2] This process of consideration and determination is a burden which Congress has placed on the administrators of the Act, to be fulfilled in every case. Section 109(a)(3) does not allow for defaults against the operator. It does the Bureau of Mines little use, therefore, to contend that the "opportunity" for such considered determinations will suffice. This would shift the initial burden to the mine operator charged with a violation. Congress chose not to adopt such an approach when it was expressly proposed in the "administration bills" of the proposed legislation. (S.1300 and H.R. 7976; 91st Congress). It is the Secretary's responsi-

bility to see that the statutory requirements are fulfilled in all cases, even where the operator does nothing. In all cases before an assessment order can become final, the Secretary must (1) meaningfully consider the six statutory criteria for penalty assessment, (2) make express determinations thereon with regard to the amount of the penalty which is warranted, and (3) make express determinations that a violation did occur. Express determinations are to be made "by decision incorporating his findings of fact therein".[2]

2. An adequate administrative procedure under the act, as this Court conceives it, would be:
1.) Notice to operator of violation, spelling out the specifics of the violation alleged by the mine inspector.
2.) Notice of proposed penalty assessment, spelling out the six statutory criteria *as applied to this violation*, e. g. upon finding that this is a major operation (xxxx tons per day or year); that the violation is the most serious (imminent danger withdrawal order—improper roof support); that the violation appears willful (or grossly negligent, negligent, etc.) and that this is the 10th such violation by this operator and that the operator has (not) made any effort to correct the violation.
3.) Opportunity to object to the proposed findings as to the violation and/or as to the appropriate penalty.
4.) Opportunity for formal adjudication and formal adjudication, if requested.

[3–5] This is not to say that the Secretary may not employ informal, preliminary procedures if he deems that advisable. It is to say that if those procedures do not resolve the matter, official action toward entry of a final assessment order by the Secretary can be taken only in compliance with the requirements outlined herein. Nor is it to say that the operator can fully turn a "deaf ear" to the proceedings and expect that the Bureau of Mines will be required by the Court to develop a record on both sides as fully as if the operator had participated by counsel throughout. The Bureau is entitled to act on the information before it, once the operator has been apprised of that information and given the opportunity to dispute or supplement it. At that point findings can properly be made on a considered evaluation of available information. This is a far cry from present procedures, where the operator receives only the form notice of violation and form notice

5.) Determination by the Secretary, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted.

This is intended as an illustrative example only. There may be other approaches which comport with the statutory requirements. This approach ensures consideration of the facts, both as to the violation and the penalty, by the Bureau by requiring that the rationale for decision be set forth.

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of the amount of penalty proposed, with failure to object resulting in an automatic and unconsidered final order against him. Under present procedures there is every possibility that an unconsidered determination as to violation and/or penalty will be entered as a "finding" and become a final order if the operator does nothing. Under the present procedures the operator had no notice of what facts under the statutory criteria entered into determination of a violation or a proposed penalty, and thus no basis on which to know whether he should or should not object, either as to the violation or the penalty. The initial burden at present is upon the operator to show why a possible arbitrary finding of violation or penalty is not appropriate, rather than being upon the Secretary to make a considered determination of violation and appropriate penalty. When the Secretary initially makes a considered determination and informs the operator of his bases, both the Secretary and the operator have a starting point from which to go forward in implementing the Coal Mine Health and Safety Act.

The Secretary, the mine operators, the miners and the public all have important interests in the effective enforcement of the Federal Coal Mine Health and Safety Act. The Congress produced an important statute, containing many varied technical and procedural provisions,

some of which are undoubtedly the products of legislative compromise. Nevertheless, all of those provisions are controlling upon the Bureau of Mines, the mine operators and the Courts. Today's decision need not hamper enforcement. Indeed if fully implemented by the Secretary it can improve and make more effective enforcement efforts which have in the past proceeded, sometimes arbitrarily, under a difficult administrative mechanism.

Upon the above considerations, and upon consideration of the entire record herein, it is this 9th day of March, 1973,

Ordered that Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment be and hereby is denied, and it is

Further ordered that Plaintiffs' Motion for Summary Judgment be and hereby is granted.

APPENDIX C

PENALTIES

SEC. 109. (a)(1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any
792. other provision of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

* * *

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 105 of this title. Any hearing under this section shall be of record and shall be
384. subject to section 554 of title 5 of the United States Code.

APPENDIX D

Title 30—MINERAL RESOURCES

Chapter I—Bureau of Mines, Department of the Interior

SUBCHAPTER O—COAL MINE HEALTH AND SAFETY

PART 100—CIVIL PENALTIES FOR VIOLATIONS OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

In accordance with the provisions of section 109 of the Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173), and pursuant to the authority vested in the Secretary of the Interior under section 508 of the Act, Subchapter O of Chapter I, Title 30, Code of Federal Regulations, is amended by adding a new Part 100, as set forth below, which provides procedures to be followed by the Bureau of Mines in assessing civil penalties for violations of the mandatory health and safety standards and other provisions of the Federal Coal Mine Health and Safety Act of 1969.

Section 109 of the Act will be enforced, until further notice, in accordance with the procedures set forth in Part 100 which shall be reviewed from time to time in the light of enforcement experience gained under the Act.

Since these regulations are procedural in nature and are promulgated to obtain an immediate maximum enforcement effort by the Bureau of Mines under the Coal Mine Health and Safety Act of 1969, and are intended to insure a maximum compliance effort under the Act on the part of the coal mining industry, Part 100 shall become effective on the date of its publication in the FEDERAL REGISTER (1-16-71).

FRED J. RUSSELL,
Under Secretary of the Interior.

JANUARY 14, 1971.

Sec.
100.1 Purpose.
100.2 Assessment of civil penalties; general.
100.3 Liability for civil penalties; policy.
100.4 Procedures for assessment of civil penalties; protest procedures.
Appendix A—Guidelines for Assessment of Penalties.

AUTHORITY: The provisions of this Part 100 issued under secs. 109 and 508, Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742; Public Law 91-173).

§ 100.1 Purpose.

The assessment of civil penalties under section 109 of the Federal Coal Mine Health and Safety Act of 1969 shall be made for the purpose of maintaining the health and safety of the miner and of insuring the maximum compliance effort on the part of the coal mining industry.

§ 100.2 Assessment of civil penalties; general.

(a) Each proposed assessment shall be made after taking into consideration (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) whether the operator was negligent, (4) the effort on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(b) The amount of the civil penalty proposed shall be within guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act, except that a particular violation may warrant proposing a civil penalty in an amount more than or less than the range set forth in the guidelines.

§ 100.3 Liability for civil penalties; policy.

(a) *Withdrawal orders.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that leads to the issuance of an Order of Withdrawal, for example:

(1) A violation that creates an imminent danger;

(2) A repeated unwarrantable failure violation; and,

(3) A violation that is not abated in the reasonable time specified by the Bureau of Mines for total abatement.

The amount of the penalty for each such violation will not be more than $10,000.

(b) *Other violations*—(1) *Serious violations.* (i) A civil penalty will be proposed in accordance with the procedures established herein for each serious violation. The amount of the penalty for each such violation will not be more than $10,000.

(ii) For these purposes, a "serious violation" will be deemed to exist if there is a substantial probability that death or serious physical harm to the miners

could result from a condition which exists, or from one or more practices which have been adopted or are in use.

(2) *Nonserious violations.* A civil penalty will be proposed in accordance with the procedures established herein for each violation that is specifically determined not to be of a serious nature. The amount of the penalty, if any, for each such violation, will not be more than $10,000.

(3) *Absence of fault.* No civil penalty will be proposed for either a serious or nonserious violation if it is determined that the operator (i) did not, and could not with the exercise of reasonable diligence know of the presence of the violation, or (ii) did not and could not have available to him at the time of the inspection the equipment, material, personnel or technology required to avoid the violation. Each such determination will be documented in writing and will set forth the specific conditions and reasons that justify such a determination.

§ 100.4 Procedures for assessment of civil penalties; protest procedures.

(a) Each Notice of Violation and Order of Withdrawal issued on or after March 30, 1970, will be reviewed by an Assessment Officer who is appointed by and responsible to the Director, Bureau of Mines, to determine the liability of the operator or miner for a civil penalty and the amount of penalty to be proposed.

(b) (1) Before any administrative proceeding to impose a civil penalty under section 109 of the Act is instituted, the Assessment Officer shall serve, by certified mail, a Proposed Order of Assessment upon the operator or miner charged.

(2) The Proposed Order of Assessment shall specify the Notice of Violation or Order of Withdrawal for which the liability of the operator or miner for a penalty has been determined and shall state the amount of the proposed civil penalty.

(c) In determining the amount of the proposed penalty, the Assessment Officer will consider all relevant circumstances, including the operator's history of previous violations, the appropriateness of such penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of violation.

(d) The Proposed Order of Assessment shall also advise the operator or miner charged that he has 15 working days from the date of receipt of the Proposed Order of Assessments to protest the proposed assessment, either partly or in its entirety.

(e) Where an operator or miner fails to timely protest a proposed assessment, he shall be deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing, and the Proposed Assessment Order shall become the final assessment order of the Secretary of the Interior.

(f) The protest to the Proposed Order of Assessment shall be in writing and shall state any facts, explanations, and arguments denying the charges of violation, or demonstrating any extenuating circumstances, error in the Proposed Order of Assessment or other reason why the penalty should not be imposed and may request the revision or modification of the proposed penalty. The operator or miner charged may request a hearing in accordance with section 109 of the Act. If a hearing is requested, the protest must so state.

(g) (1) The Assessment Officer may extend in writing the time within which the operator or miner has to protest the Proposed Order Assessment.

(2) Upon receipt of a protest, the Assessment Officer may reconsider the proposed assessment and may redetermine any proposed civil penalty.

(3) The Assessment Officer, upon reconsideration, may amend or reissue the Proposed Order of Assessment.

(h) The operator or miner charged shall have 15 working days from date of receipt of such amended or reissued order to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing.

(i) (1) Where the operator or miner requests formal adjudication of the assessment penalty under section 109 of the Act, the Assessment Officer shall forward the matter to the Associate Solicitor for Mine Health and Safety who shall file a petition to assess penalty with

the Office of Hearings and Appeals of the Department of the Interior.

(2) The petition shall be served on the operator or miner who shall then answer the petition and be afforded an opportunity for a public hearing.

(3) The Office of Hearings and Appeals shall thereafter issue an order, based on Findings of Fact and Conclusions of Law.

(4) In assessing a penalty, the Office of Hearings and Appeals may redetermine the amount of the civil penalty for each violation in any amount not to exceed $10,000.

APPENDIX A

GUIDELINES FOR ASSESSMENT OF PENALTIES

Type of violations	*Penalty Range*
1. Mine Operators:	
A. Imminent Danger Withdrawal Orders	$5,000–$10,000
B. Other Withdrawal Orders	$1,000–$5,000
C. Serious Violations	$100–$1,000
D. Nonserious Violations	$25–$500
2. Miners:	
Smoking or the carrying of smoking materials, matches, or lighters	$25–$250

NOTE: Consideration of all relevant circumstances in the case of a particular violation may warrant the Assessment Officer's proposing a civil penalty in an amount more than or less than the range set forth above.

[FR Doc.71-748 Filed 1-15-71;9:47 am]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1752, 73-1753 & 73-1848

ROGERS C. B. MORTON, Secretary of Interior,
United States Dept. of Interior

v.

DELTA MINING, INC.

United States of America,
Appellant in No. 73-1752

ROGERS C. B. MORTON, Secretary of the INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR

v.

G. M. W. COAL COMPANY, INC.

United States of America,
Appellant in No. 73-1753

ROGERS C. B. MORTON, Secretary of Interior, UNITED STATES DEPT. OF THE INTERIOR

v.

EDWARD MEARS, EARL BENCE, CHARLES J. MEARS, MURRAY MARTIN, ROCCO YANITY, CASMER YANITY, and TONY YANITY, individually, and as partners t/d/b/a M. Y. COAL COMPANY

United States of America,
Appellant in No. 73-1848

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Civil Nos. 73-857, 72-890, 72-928

Argued January 10, 1974

Before: ADAMS, HUNTER and WEIS, *Circuit Judges*

JOHN L. MURPHY, Chief
Government Regulations Section
Criminal Division

RICHARD I. CHAIFETZ
Attorney
Department of Justice
Washington, D.C.

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OPINION OF THE COURT

(Filed March 20, 1974)

ADAMS, *Circuit Judge*

The question on this appeal is whether, under the Federal Coal Mine Health and Safety Act,[1] the Secretary of Interior may assess civil penalties against mine operators without making and publishing factual findings. The district court, in which the Secretary sought enforcement of assessment orders against the defendant mining companies,[2]

1. 30 U.S.C. §§ 801 *et seq.*

2. Separate enforcement proceedings were brought against G.M.&W. Coal Co., Inc., Delta Mining, Inc. and Edward Mears, d/b/a M. Y. Coal Company. The cases involve identical issues, and so the appeals were consolidated in this court. The several appellee coal companies are referred to herein collectively, as "defendants."

held that the orders were invalid because of the absence of such findings, and the Secretary appealed.

The Act was passed in 1969 to "protect the health and safety of the Nation's coal miners."[2a] At various times during 1971, inspectors of the Bureau of Mines, Department of Interior, entered and inspected the coal mines operated by the various defendants, seeking to determine the extent of compliance or non-compliance with the Act, and with the regulations promulgated thereunder.[3] During the course of these visits the inspectors detected a number of violations of the Act or the regulations. In each such instance, an inspector served the defendant in question with a notice of the infraction. Each notice stated that the particular violation had to be abated by a certain date. On the date set for abatement, the inspector returned to the mine and, upon determining that the violations had in fact been abated, furnished the defendant with a notice to that effect.

After the abatement of each violation and the notification of the defendant involved, the local office of the Bureau of Mines sent copies of the notices of violation and abatement to the Bureau's central office in Washington, D.C. There an Assessment Officer reviewed the various notices and sent proposed penalty assessment orders to the defendants.[4]

The proposed penalty assessment orders informed each defendant that the Assessment Officer, after giving "due consideration" to certain statutory criteria, intended to assess civil penalties in various amounts; that the defendants could protest the assessments in writing; and that the defendants had a right, secured by statute, to request hearings. Each defendant protested the orders.[5] However, the

2a. 30 U.S.C. § 801(g)(1).

3. 30 C.F.R., Ch. 1, subch. 0.

4. In most instances, the Assessment Officer consolidated several violations into one proposed penalty assessment order.

5. When a protest is made to a proposed order, the Assessment Officer may either vacate, modify or affirm the proposed order. If the proposed order is vacated, the proceeding ends there; if it is modified or affirmed, the violator has the right to seek a hearing, which is held at a location as near as possible to the coal mine involved.

Assessment Officer did not consider that a reduction in the size of the penalties was called for, and he accordingly notified the defendants of his affirmance of the proposed orders.

The defendants were also notified, upon affirmance of the proposed orders, that they had 15 days in which to request a hearing, and that upon their failure to do so within the prescribed time the proposed orders would become the final orders of the Secretary. No hearings were requested and the final orders of the Secretary were entered. When the defendants failed to pay the assessments set forth in the final orders, this action for enforcement was brought in the district court.[6]

Section 109(a)(3) of the Act[7] provides in part as follows:

> "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing, and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. . . . Any hearing under this section shall be of record and shall be subject to section 554 of Title 5."

Section 109(a)(1)[8] enumerates six factors to be considered by the Secretary in determining the amount of any penalty assessment:

> "In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether

6. Section 109(a)(4) of the Act, 30 U.S.C. § 819(a)(4), provides for actions in the district courts to enforce penalty assessment orders.

7. 30 U.S.C. § 819(a)(3).

8. 30 U.S.C. § 819(a)(1).

the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

The proposed orders of assessment which the defendants received from the Assessment Officer were on preprinted forms which recited, in some instances, that the six factors set out in the statute had been considered.[9] The final orders entered by the Secretary did not mention the six statutory criteria at all, but merely set forth the Secretary's finding that a violation "did, in fact, occur."[10] The defendants contend, and the district court agreed, that in omitting from the final orders express findings of fact relating to the statutory criteria for determining the amount of the penalty, and so providing no assurance of any considered application of these criteria, the Secretary failed to satisfy the requirements of section 109(a)(3).

The Secretary counters that the language of that section, requiring a "decision incorporating his findings of fact therein," applies only when a defendant has requested an oral hearing, and that when, as here, the Secretary makes a "decision" without any hearing, it is unnecessary under the statute to include any findings of fact.[11] We reject this contention and affirm the district court's grant of summary judgment in favor of the defendant mine operators.

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9. One proposed order lists, as having been considered, the six criteria of section 109(a)(1). Some of the others merely state that consideration has been given to "all available information, including the gravity of the violation."

10. The "finding" that a violation "did in fact, occur,"—which is required under section 109—was originally made by the Assessment Officer. Curiously, the Assessment Officer did not make the finding of violation, in some cases, until several months after the entry of the proposed orders of assessment.

11. The Secretary characterizes the entry of a final order after failure of the violator to request a hearing as a type of "default judgment," and argues that since the operator has willingly forfeited his "day in court," he will not be heard to object to the absence of findings. This reasoning is appealing but, as will be shown, not applicable.

We note that, in ordering penalty assessments without making express findings, the Secretary was acting pursuant to, and in apparent conformity with, the pertinent Regulations of the Department of Interior.[12] Regulation 100.4(h)[13] provides that once a proposed order of assessment has been made, the operator charged shall have 15 days in which to accept such order of the Assessment Officer or to seek a "formal adjudication." Acceptance, or failure to request an adjudication, results under the Regulation in the proposed order becoming "the final assessment order of the Secretary." Thus, the Regulations appear to contemplate the very procedure that was utilized here: a proposed order became final without the Secretary himself making findings on the question of penalty amount.[14] The question before us then, narrows to whether Regulations themselves, as implemented, were consistent with the requirements of the Coal Mine Health and Safety Act.

As noted above, the Act provides that a civil penalty may be assessed only after the operator "has been given an opportunity for a public hearing." The language of the Act would appear to require also that, whether or not the operator requests a hearing, the assessment *must* be made "by [the Secretary's] decision incorporating his

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12. 30 C.F.R. Pt. 100, effective January 14, 1971. The Part 100 Regulations were amended in some small details on June 15, 1972, and were indefinitely suspended on April 24, 1973. *See* 38 Fed. Reg. 10085, 4/24/73. The references in this opinion are to the Regulations in force between January 14, 1971 and June 15, 1972.

13. 30 C.F.R. §100.4(b). There are other Interior Regulations (30 C.F.R. §301.50, now 43 C.F.R. Part 4) dealing with penalty assessments, the relevance or validity of which we do not pass upon here.

14. It is apparent that the "findings" of the Assessment Officer on the issue of penalty amount, where made, were little more than *pro forma* recitations that the pertinent statutory criteria had been considered. *See* Note 7, *supra*, and accompanying text. In view of the realities of the penalty assessment procedure, we reject the contention that the "findings" as to penalty amount set out in some of the proposed orders were the sort of findings contemplated by section 109. Mere recitation that the statutory criteria for gauging penalty amounts have been given "due consideration" will not convince us "that the agency has . . . really taken a 'hard look' at the salient problems and has . . . genuinely engaged in reasoned decision-making." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) cert. denied, 403 U.S. 923 (1971).

findings of fact therein, that a violation did occur and the amount of the penalty which is warranted." The Secretary seeks refuge from this interpretation by pointing to the legislative history, which, he asserts, supports his reading of section 109.

Nothing in that history convinces us, however, that any departure from the plain import of the statutory terms is warranted.[15] There is not a modicum of evidence in the reports from either House of Congress,[16] nor in the Conference Committee report on the compromise bill that became section 109,[17] that would indicate an intent to dispense with findings of fact where no hearing is requested.

Another consideration, apparent on the face of section 109, tends to indicate that findings are required when a violator does not seek a hearing as well as when he does. When a hearing is requested, the section 109 triggers the application in that proceeding of section 5 of the Administrative Procedure Act[18] which, by incorporating section 8 of the APA,[19] requires that the final decision of the Secretary be accompanied by findings. Thus the language in section 109 itself requiring findings would be merely duplicative if it did not refer to some situation other than that in which a hearing is requested and held. While duplication and repetition in statutory language are certainly not unheard of, it would seem a salutary rule to avoid reading the terms of a statute as mere surplusage in the absence of some proof that they were so intended. Lacking such proof here, we conclude that Congress intended *every* final

15. Indeed, the statutory language appears so unequivocal that we question whether resort to legislative history is even appropriate in interpreting section 109. *See* Schiaffo v. Helstoski, No. 72-2167/68, (3d Cir., Jan. 4, 1974), slip op. at 25, 26; Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947).

16. *See* H. Rep. 91-563, 91st Cong., 1st Sess., and S. Rep. 91-411, 91st Cong., 1st Sess. The documents are included in Legislative History of Federal Coal Mine Health and Safety Act, compiled by the House Committee on Education and Labor, at pp. 569, 93, respectively.

17. *See* H. Rep. 91-781, 91st Cong., 1st Sess.

18. 5. U.S.C. § 554.

19. 5 U.S.C. § 557.

assessment order of the Secretary to be accompanied by findings of fact.[20]

Findings of fact, explicit and public, are necessary to assure that the administrative process not degenerate into arbitrariness or, worse, into discrimination and spite.[21] Thus, thought flexibility and the capacity to make rapid determinations are vital weapons in every administrator's arsenal, "we cannot assume in the absence of adequate explanation that proper standards are implicit in every exercise of administrative discretion."[22] Judicial review of a final administrative determination is heralded as a right,[23] and such review is rendered practically impossible, or at least vastly more difficult, where the agency's decision is not accompanied by express findings.[24]

Though it might not be beyond Congress' power to provide for the entry by the Secretary of penalty assessment orders without findings of fact, such a provision would run against the grain of much of our administrative jurisprudence. The Secretary has failed to adduce any evidence that Congress intended, in enacting section 109, to permit some final determinations to be entered without such find-

20. The Secretary also mounts a semantic argument against the district court's construction of the statute, by asserting that the word "therein" in section 109 refers to the *hearing*, and not to the "decision" of the Secretary. Thus, he claims, when no hearing is held, there can be no "findings of fact therein." Since the word "decision" follows "hearing" in the statute, the most natural and probable referent of "therein" is "decision," not "hearing." Words in statutes ordinarily should be accorded their most common, everyday meanings. *See, e.g.*, McBoyle v. United States, 278 U.S. 41, 48 (1928). Nor can we fail to note that section 109 makes a second use of the word "therein," the referent of which is clearly "decision" and not "hearing." *See* text accompanying note 7, *supra*.

21. *See* Note, *Administrative Findings Under Section 8(B)* [of the APA], 51 Va. L. Rev. 459, 462-64 (1965); K. C. Davis, Discretionary Justice, ch. VI (1969).

22. Environmental Defense Fund, Inc. v. Ruckleshaus, 439 F.2d 584, 596 (D.C. Cir. 1971).

23. *See* PBW Stock Exchange, Inc. v. Securities and Exchange Comm'n, 485 F.2d 718, 750 (3d Cir. 1973) (*dissenting opinion* of Adams, J.).

24. *See* Environmental Defense Fund, Inc. v. Ruckleshaus, *supra*, 439 F.2d at 598: "Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. . . . Discretionary decisions should more often be supported with findings of fact and reasoned opinions." *See also* K. C. Davis, *supra*, at 103-106.

ings. Indeed, there is substantial evidence, on the face of the statute, just to the contrary. We therefore hold that the assessment orders in this case were invalid, and that, to the extent they were entered in conformity with the Regulations, those Regulations too were invalid.[25]

In so holding, we observe that the Bureau of Mines has not, to date, established or adopted any detailed guidelines to assist Assessment Officers in the application of the six statutory criteria set out above for the exaction of civil penalties. The absence of any such guidelines has led the Comptroller General, in a report on the Bureau of Mines,[26] to state that:

> "We [the Comptroller General] were unable to determine the adequacy of the consideration given to the six factors and the basis for the penalties assessed in [400] sample cases.
>
> • • •
>
> ". . . [T]he mine operators did not know how the factors should be considered and weighed in determining the amount of the penalty." [27]

Guidelines would go far toward assuring that penalty assessments bear a real and substantial relation to the six congressionally-selected factors. In the absence of such guidelines—and their promulgation is for the Secretary, not the courts—the clear mandate of section 109 must suffice. That mandate requires, at a minimum, that each final assessment order be accompanied by the Secretary's express findings, concerning both the fact of violation and the appropriate penalty amount.

25. As noted in Note 9, *supra*, the Part 100 Regulations have now been indefinitely suspended.

26. Report by the Comptroller General to the Conservation and Natural Resources Subcommittee, House Committee on Government Operations, entitled "Improvements Needed in the Assessment and Collection of Penalties—Federal Coal Mine Health and Safety Act of 1969" (July 5, 1972).

27. *Id.* at 25-26.

We are in full sympathy with the goals and spirit expressed in the Coal Mine Health and Safety Act, and we have listened with concern to the Secretary's claim that a requirement of findings in every case may hobble efforts at effective enforcement of the Act's penalty provisions. Yet, we do not consider it appropriate to substitute for Congress' directive the Secretary's, or our own, notions of how best to administer the Act. Though the attainment of safe, reasonably healthy conditions in the coal mines is a commendable statutory objective, so too is the assurance that no one, be he miner or coal magnate, be treated arbitrarily or discriminatorily in any administrative proceeding.

Moreover, it may well be that the requirement of findings of fact in every case will mitigate, not worsen, the administrative burden cast upon the Secretary by his duty to enforce the Act. Where the proposed orders entered by the Assessment Officer, and the final orders of the Secretary, evince that full consideration has been given to the statutory criteria, mine operators may be less inclined to challenge the assessments by way of either administrative hearings or judicial proceedings. That is to say, without some positive indication of the Secretary's basis for calculating a particular assessment, an operator cannot make a reasoned judgment whether a penalty is a fair one, or a merely arbitrary exaction. Thus, by making explicit findings of fact in each instance—that is, by making public a process that ought to be undertaken anyway—the Secretary may well forestall numerous costly and time-consuming adjudicative proceedings.

We are aware that, only recently, the District of Columbia Circuit reached a conclusion concerning the Act that is at odds with our holding in this case. In National Independent Coal Operators' Ass'n v. Morton,[28] that court reasoned that "the operator's failure to request a hearing suggests that he does not dispute the fact of violation nor

28. No. 73-1678 (D.C. Cir., Feb. 11, 1974).

disagree with the appropriateness of the specific penalty proposed," and that "[w]here no issue is disputed by the operator, we do not believe that Section 109(a)(3) requires the Secretary to prepare a formal decision which merely would consist of the same information already contained in the proposed assessment order."[29]

At least two considerations serve to distinguish the cases before us from that apparently confronting the District of Columbia Circuit in *National Independent*. First, in the cases before us, the defendant operators' failure to request a hearing in no way suggests that the appropriateness of the penalty amount went undisputed. In each instance, the operators lodged protests with the Assessment Officer, indicating that the propriety of the amounts was a hotly contested issue. In these circumstances, we are reluctant to infer from the operators' failure to request hearings that their objections to the penalty amounts suddenly ceased. There are other equally plausible reasons, cost and inconvenience among them, to explain the defendants' failure to seek formal hearings.

Second, a decision by the Secretary which sets out his findings of fact in these cases and thus demonstrates a considered application of the criteria of section 109, would not "consist of the same information already contained in the proposed assessment order." As indicated above, the proposed assessment orders in this case contained *no* "information" other than *pro forma* recitations that the six criteria for determining penalty amount had been considered. Thus, findings of fact in these cases would provide the operators with information they had not yet received, information to which, under our view of the Act, they are entitled.[30]

29. *Id.*, slip op. at 9.

30. The District of Columbia's decision in *National Independent* appears to buck the drift of much of that Court's prior administrative jurisprudence. *See, e.g., Ruckelshaus* and *Greater Boston Television*, supra; D.C. Federation of Civil Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972); Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Station KFH v. FCC, 247 F.2d 570 (D.C. Cir. 1957).

Thus, at least in the context of these enforcement actions,[31] we adhere to the view that each final decision of the Secretary must be accompanied by findings of fact, concerning both the fact of violation and the magnitude of the penalty.[32]

The judgment of the district court will be affirmed.

31. *National Independent, supra,* involved a suit to enjoin application of the civil penalty assessment procedures embodied in the Pt. 100 Regulations.

32. We have considered and rejected two other contentions of the Secretary, (1) that the enforcement procedure in the district court cures any defects in the Secretary's final order, and (2) that by failing to object to the lack of findings in any administrative proceeding the defendants have failed to "exhaust administrative remedies," and so are barred from objecting in the courts. In connection with the second contention, we note that once a final order has been entered, there is no opportunity to lodge an objection with the Secretary or Bureau of Mines.

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Clerk of the United States Court of Appeals for the Third Circuit.

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ORDER AMENDING OPINION

Present: ADAMS, HUNTER and WEIS, *Circuit Judges.*

It is ORDERED that the opinion of this Court filed March 20, 1974, be and hereby is amended as follows:

(1) The first sentence in the first full paragraph on page 9 of the slip opinion is amended to read as follows:

> "In so holding, we observe that the Bureau of Mines had not, at the time these assessments were made, established. . . ."

(2) The last word in line 10 on page 9 is deleted.

By THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: June 12, 1974